The copy-out of Directive 2014/24/EU in the UK and its limited revision despite the imminence of Brexit

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ABSTRACT

This article provides a critical assessment of the implementation of Directive 2014/24/EU in the UK by the *Public Contracts Regulations 2015*. It explores the implications of the copy out approach followed to avoid gold-plating the transposition of the 2014 EU Public Procurement Package, as well as the deficiencies that result from the perspective of constructing a developed regulatory system. The analysis concentrates on selected novelties of Directive 2014/24/EU, as well as in areas where Member States were granted discretion to choose between a set of options or to find their own mechanisms to achieve certain aims established at EU level. The article concludes that the UK missed an opportunity to develop a full regulatory architecture for the control of public expenditure by means of procurement and stresses how, despite the imminence of Brexit, there is no indication of a significant reform of UK public procurement law any time soon.

KEY WORDS

Public procurement, transposition, Directive 2014/24/EU, Public Contracts Regulations 2015, gold-plating, copy-out, Brexit.

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1. Introduction

This article provides a critical analysis of the UK's transposition of Directive 2014/24/EU. Its approach is largely descriptive in order to allow for comparisons with the other contributions to this special issue. Where possible, however, the article provides an EU law-based criticism of the UK's transposition.

Due to the peculiarities of the UK's constitutional arrangements,[1] it is necessary to clarify from the outset that the need to transpose EU law in a manner that respected the powers of the devolved administrations of Scotland, Wales and Northern Ireland led to the transposition of the 2014 Public Procurement Package resulting in two sets of rules:[2] one for England, Wales and Northern Ireland, and one for Scotland. This article does not cover Scots law.

It is also necessary to point out that the UK's EU exit (Brexit) could potentially alter both the obligation for the UK to retain the transposition of the 2014 EU procurement rules as its controlling regulatory framework post-Brexit, as well as its approach to the regulation of public procurement more generally.[3] However, there are very clear indications that a significant departure of the current rules is highly unlikely and that the 2015 transposition of the 2014 EU rules will continue to operate as the prime domestic regulatory instrument. First, due to the already agreed UK's accession to the World Trade Organisation Government Procurement Agreement (WTO GPA) in its own right once it leaves the EU,[4] which will by and large require a consolidation of the regulatory status quo. Second, due to the extremely limited—and possibly illegal[5]—technical adjustments foreseen by draft post-Brexit legislation even in the case of no deal.[6] Therefore, this article proceeds on the basis that the transposition of the 2014 rules is still worth analysing in detail, as no reform of UK public procurement law is likely any time soon.

Regarding the jurisdiction for England, Wales and Northern Ireland, the powers to adopt secondary or subordinate legislation in section 2(2) of the *European Communities Act 1972*[7] allowed

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Note: All websites visited on 12 March 2019.

[1] See *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[2] See LRA Butler, "Below Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach", in D Dragos & R Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?* (Copenhagen, DJØF Publishing, 2012) 283-284; and P Telles, "Awarding of Public Contracts in the United Kingdom", in M Comba & S Treumer (eds), *Award of Contracts in EU Procurements* (Copenhagen, DJØF Publishing, 2013) 251-253.

[3] For extended discussion, see S Arrowsmith, "The Implications of Brexit for Public Procurement Law and Policy in the United Kingdom" (2017) 1 PPLR 1-33; P Telles & A Sanchez-Graells, "Examining Brexit Through the GPA's Lens: What Next for UK Public Procurement Reform?" (2017) 47(1) *Public Contract Law Journal* 1-33; and idem, "Brexit and Public Procurement: Transitioning into the Void?" (2019) 44(2) *European Law Review* 256-278.

[4] WTO, "UK set to become a party to the Government Procurement Agreement in its own right", 27 February 2019, https://www.wto.org/english/news_e/news19_e/gpro_27feb19_e.htm.

[5] J Williams, "Legislating the Byzantine way: the Brexit Procurement Sis", Monckton Chambers Brexit Blog, 12 March 2019, https://www.monckton.com/legislating-the-byzantine-way-the-brexit-procurement-sis/.

[6] See Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 and The Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019). See also Procurement Policy Note –Preparing for the UK Leaving the EU, Action Note PPN 02/19, March 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784325/Procurement_Policy_Note__02_19_Preparing_for_the_UK_Leaving_the_EU.pdf.

[7] SI 1972 No. 68. For an overview of these powers, see V Miller, "Legislating for Brexit: Statutory Instruments implementing EU law", House of Commons Library Briefing Paper No. 7867, 16 January 2017, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7867.

the UK Government to transpose the 2014 EU Public Procurement Package without the need for a full-fledged Parliamentary debate,[8] and well in advance of the transposition deadline of 18 April 2016. Given that it had succeeded in obtaining all reforms to EU public procurement law that were set out as strategic priorities to influence the process,[9] the Cabinet Office considered that the "*revised* [EU] *package represents an excellent overall outcome for the UK, with progress achieved on all of our priority objectives*".[10] Thus, the UK Government was keen to carry out an early transposition so that the UK could take advantage of the additional flexibilities in the new rules as soon as possible. The transposition of Directive 2014/24/EU[11] by the *Public Contracts Regulations 2015* (PCR2015)[12] came into force on 26 February 2015.

Simply put, the PCR2015 are copy of Directive 2014/24/EU, with minor drafting corrections.[13] The preparation of the PCR2015 started with a targeted consultation in 2013,[14] which was later complemented by a further public consultation of the draft regulations and a technical note on their drafting.[15] Despite the broad consultation, it was always made clear that "*the government's policies on "copy-out" of European Directives (where available) and avoidance of "gold-plating", … limit the extent to which Cabinet Office can deviate from the wording of the EU directive when casting the national UK implementing regulations*".[16] Indeed, based on a general principle of avoiding gold-plating by means of copy-out,[17] the 2013 *Guiding Principles for EU Legislation*[18] indicated that, when transposing EU law, the UK Government would, among other constraints, "***always use copy out for transposition where it is available, except where doing so would adversely affect UK interests*** *e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts*".[19] This approach was fleshed out in more detail in the

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[8] See Miller (n 7) 7. In the specific case of the *Public Contracts Regulations 2015*, the House of Lords debated a 'Motion to Regret' the haste with which the transposition was carried out, but the motion was eventually withdrawn; see HL Deb 25 March 2015, vol 760, cols 1516-1524.

[9] See Information Note 05/11 of 10 August 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62104/PPN5-11-Influencing-activity-on-modernisation-of-public-procurement-rules.pdf.

[10] See Information Note 05/13 of 25 July 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225398/PPN_-_outcome_of_negotiations.pdf.

[11] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

[12] SI 2015 No. 102. For an article by article comment on its provisions, see A Sanchez-Graells & P Telles, *Commentary to the Public Contracts Regulations 2015* (2016) : www.pcr2015.uk.

[13] For a critical assessment of this phenomenon, more broadly, see S Anselmi & F Seracini, "The Transposition of EU Directives into British Legislation as Intralingual Translation: A Corpus-Based Analysis of the Rewriting Process" (2015) 2 *Textus* 39-62.

[14] Information Note 05/13 of 25 July 2013, http://www.bit.ly/1fbpKnV.

[15] The consultation documents and outcomes, including the *Government response to the consultation on UK transposition of new EU Procurement Directives: Public Contracts Regulations 2015*, are https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives.

[16] Information Note 05/13 (n 14) para [15].

[17] For discussion, see D Greenberg, "The 'Copy-Out' Debate in the Implementation of European Union Law in the United Kingdom" (2012) 6(2) *Legisprudence* 243-256. For a critical assessment of this approach from the perspective of regulatory technique, see LE Ramsey "The Copy Out Technique: More of a 'Cop Out' than a Solution?'" (1996) 17(3) *Statute Law Review* 218-228; and H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Oxford, Hart, 2014) 169.

[18] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78800/Guiding_Principles_for_EU_legislation.pdf.

[19] Emphasis added.

2013 updated guidance on the transposition and effective implementation of EU Directives.[20] Given these policy choices and the fact that the copy-out approach had already informed the UK's transposition of the previous generation EU public procurement directives,[21] it should come as no surprise that compliance "copy-out" was at the forefront of the UK Government's transposition of the 2014 Public Procurement Package.[22] The PCR2015 *Explanatory Memorandum*[23] stated that

> The Cabinet Office's general approach … **has been to use the 'copy-out' technique** … on the whole, **the Regulations retain the key operative phrases which the Directive uses to express the obligations which are to be imposed on contracting authorities**. Where it was absolutely clear what a clumsily worded passage in the Directive was intended to mean, and would be held to mean, the Cabinet Office has rephrased the corresponding passage in the Regulations with greater precision or in a way that would be more readily understood by readers of UK legislation. By contrast, where there was considered to be genuine ambiguity in the Directive, this has usually been reproduced in the Regulations.[24]

This copy-out approach not only informed the general transposition strategy, but also a number of specific policy choices that Directive 2014/24/EU had left to Member States' discretion. In particular, the *Explanatory Memorandum* indicated that

> Policy choices, ie where the directive permits one or more options, should be made in line with **the Government's proposed approach of rule-simplification and ensuring flexibility for procurers, not impose new burdens on practitioners or "gold-plate" the directive without sufficient evidence to necessitate it**. This includes choosing not to ban the possibility for contract award criteria to be based on lowest price; not imposing new obligations on sub-contractors; and ensuring that all authorities and all suppliers, (including those have yet to fully use e-communications), have adequate time to prepare for the transition to mandatory electronic communications.[25]

Such minimalistic approach allowed for a speedy transposition. However, it is worth noting that the PCR2015 had to be amended by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016*[26] in order to correct a relatively large number of technical problems with the text of the PCR2015, in particular to ensure compatibility with EU law where changes in drafting had introduced substantive deviations from the EU rules (see §2 below). Completing the transposition of the rest of the 2014 Public Procurement Package took longer but was also on time.[27] For simplicity, this article only considers the partial transposition of the 2014 EU Public Procurement Package through the PCR2015. Specific issues concerning the transposition of the rules on utilities

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[20] The guidance was further revised in February 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682752/eu-transposition-guidance.pdf. For discussion of the previous iteration of the guidance, see V Miller, "Making EU law into UK law", House of Commons Library SN/IA/7002, 22 October 2014, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07002.

[21] S Arrowsmith, "Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance" (2006) 3 PPLR 86-136.

[22] See LRA Butler, "Exclusion, Qualification and Selection in the UK under the Public Contracts Regulations 2015", in M Burgi, M Trybus & S Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (Copenhagen, DJØF Publishing, 2016) 189-190. See also P Henty, "Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015" (2015) 3 PPLR NA74-NA80.

[23] http://www.legislation.gov.uk/uksi/2015/102/memorandum/contents

[24] *Ibid* para [3.1], emphasis added.

[25] *Ibid* para [8.2.5.4], emphasis added.

[26] SI 2016 No. 275.

[27] Indeed, both the *Utilities Contracts Regulations 2016* (SI 2016 No. 274) and the Concession Contracts Regulations 2016 (SI 2016 No. 273) came into force on 18 April 2016.

procurement[28] and on concession contracts[29] are set aside in order to avoid repetition and unnecessary complication. Suffice it to note here that the UK Government followed the same broad transposition strategy (*ie* copy-out) throughout.[30]

It is worth noting that the rules in the PCR2015 are complemented by a set of guidelines and soft law instruments adopted by the Crown Commercial Service (CCS)[31]—the UK Government's central purchasing body, which leads on procurement policy on behalf of the UK Government. Following the transposition of Directive 2014/24/EU, the CCS has adopted subject-specific guides on a wide range of issues.[32] Contracting authorities and entities covered by the PCR2015 need to consider this guidance in their procurement activities. Further, in case of litigation, interested parties need to take into account the very recent Guidance note issued by the Technology and Construction Court (TCC).[33] It is also worth noting that, differently from other jurisdictions and due to the relatively more limited litigation of procurement cases and the relatively larger number of extrajudicial settlements reached in the UK, case law offers a limited source of interpretative guidance. Therefore, a joint consideration of the PCR2015 and CCS guidance offers the main regulatory framework to assess the transposition of the 2014 Public Procurement Package in the UK.

The remainder of this article aims to offer a critical assessment of selected issues concerning the transposition of Directive 2014/24/EU in the UK. Section 2 discusses some questionable aspects in the implementation that resulted from the abovementioned copy-out approach. Section 3 then concentrates on specific issues related to some of the novelties of Directive 2014/24/EU, including optional aspects and the broader goals that Directive 2014/24/EU mandated on Member States. Section 4 then looks at the fit of the UK's transposition with some recent case law of the Court of Justice of the European Union (CJUE). Section 5 concludes.

2. Questionable implementation

The copy-out approach followed by the UK in the transposition of Directive 2014/24/EU not only 'imported' into domestic law some of the shortcomings intrinsic to that form of EU legislative instrument (see also §4 below), but also created some problems of its own. As mentioned above, shortly after the adoption of the PCR2015, it was necessary to correct some of its content in order to ensure compatibility with EU law—or, in other words, to correct some instances of incorrect transposition. This was the case, for example, of reg.72 PCR2015 on modification of contracts during their term, which transposed Art 72 of Directive 2014/24/EU. The discrepancy was that the PCR2015 regulated as alternative what the directive had set as cumulative conditions for the modification of contracts due to technical or economic issues, and particularly concerning interchangeability and

[28] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

[29] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

[30] See R Ashmore & P Henty, "The Utilities Contracts Regulations 2016" (2016) 4 PPLR NA132-NA137; and R Ashmore, "The Concessions Contracts Regulations 2016" (2016) 4 PPLR NA138-NA143.

[31] See https://www.gov.uk/government/organisations/crown-commercial-service.

[32] All guidance is https://www.gov.uk/guidance/transposing-eu-procurement-directives.

[33] See *TCC Guidance Note on Procedures for Public Procurement Cases* (July 2017), http://www.procurementportal.com/files/Uploads/Documents/TCC%20Guidance%20Note%20on%20Public%20Procurement%20Cases%20final.pdf.

interoperability requirements.[34] This was corrected by a modification of reg.72 PCR2015 that clarified that both requirements are cumulative. Reg.57(11) PCR2015 on the duration of exclusion of economic operators was also problematic, as it opted to apply the maximum of 5 years of exclusion to economic operators in breach of their obligations to pay taxes or social security contributions as established by a judicial or administrative decision having final and binding effect [reg.57(3)]. This deviated from Art 57 of Directive 2014/24/EU. The discrepancy was later corrected in order to align the UK rules to the EU standard.

In addition to these issues—which have been largely corrected in the 2016 reform of the PCR2015—in my view, the main problem with following such a strict copy-out approach in the transposition of the 2014 Public Procurement Package is that, despite its increasing prescriptiveness, it must be acknowledged that Directive 2014/24/EU does not create a complete regulatory system for the award of public contracts.[35] The Directive is not meant to provide a full '*rule book*',[36] but rather to harmonise specific aspects of the procurement process and to set minimum standards and general principles applicable across the EU. It establishes a blueprint (or straitjacket, depending on one's reading of it) for domestic procurement systems,[37] but it is not sufficient for the carrying out of fully operational procurement processes. Some of these issues derive from the optionality left to Member States (on which see §3 below), but others simply result from the (largely implicit) constraints of the principle of subsidiarity in EU law. Ultimately, in order to make the provisions of the 2014 Public Procurement Package fully operational, it is necessary to insert them into a broader framework of domestic public law or, at the very least, to develop some of its bare bone provisions. By sticking to the letter of the 2014 Directive so closely, the transposition in the PCR2015 has resulted in clear deficiencies in UK public procurement law—some of which, in my opinion, are instances of insufficient or incorrect transposition.

Even if there are other examples—such as the insufficient development of the rules of reg.73 PCR2015 on termination of contracts during their term[38]—in my view, the clearest instance of defective transposition is that of reg.76 PCR2015 concerning the principles for the award of contracts for social and other specific services, which transposes Art 76 of Directive 2014/24/EU.

One of the initial difficulties in assessing the appropriateness of the transposition of Art 76 Dir 2014/24 by means of reg.76 PCR2015 derives from the opening clause of the EU provision, whereby "*Member States **shall put in place** national rules for the award of contracts*" for social and other specific services.[39] In a literal reading, this may be seen as requiring the creation of a general (national) procedural framework for the award of these contracts or, in other words, a set of common, generally applicable rules. If that was the proper interpretation, then reg.76(1) PCR2015

[34] A Sanchez-Graells, "Modification of Contracts During their Term under Reg. 72 Public Contracts Regulations 2015", *How to Crack a Nut*, 19 June 2015, http://www.howtocrackanut.com/blog/2015/06/modification-of-contracts-during-their.html.

[35] For a similar criticism to the transposition in Germany, see D Wolff & M Burgi, "Scaling down the cascade: A critical analysis of the implementation of Directive 2014/24 into German public procurement law", in S Treumer & M Comba (eds), *Modernising Public Procurement: The Member States Approach*, vol. 8 European Procurement Law Series (Edward Elgar, 2018) section 1.2.

[36] *Cf* eg US Federal Acquisition Regulations, https://www.acquisition.gov/.

[37] On that aspect, it shares some structural similarities with the UNCITRAL 2011 Model Law on Procurement, http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html.

[38] A Sanchez-Graells, "Termination of Contracts under Reg. 73 Public Contracts Regulations 2015", *How to Crack a Nut*, 22 June 2015, http://www.howtocrackanut.com/blog/2015/06/termination-of-contracts-under-reg-73.html.

[39] Emphasis added.

may have failed to properly create those "*national rules for the award of contracts*" by determining that "[c]*ontracting authorities shall determine the procedures that are to be applied in connection with the award of contracts*" or social and other specific services. By granting contracting authorities (almost) unfettered discretion to determine the applicable procedures, reg.76(1) PCR2015 may have failed to set any sort of specific "*national rules for the award of contracts*". However, such a literal reading of the requirement in Art 76(1) *ab initio* Dir 2014/24 may be opposed on the basis of the principles of procedural autonomy and subsidiarity, so this may not carry as much weight as one may initially have thought. In any case, it is also possible to read national as domestic, in which case this discussion would be moot.

Be it as it may, however, looking at the details of the very light touch approach adopted by reg.76 PCR2015, the defects seems even more apparent. Reg.76(3) PCR2015 sets out bare minimum requirements for procedures initiated by one of the notices mentioned in reg.75 PCR2015, whereby the contracting authority shall conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about conditions for participation, time limits for contacting the contracting authority, and the award procedure to be applied. Reg.76(6) PCR2015 adds that all time limits imposed on economic operators, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate. Taken together, this barely creates any specific rule other than implicitly following the case law preventing substantial modifications of tender procedures without cancellation and re-advertisement.

The big problem comes, in my view, with reg.76(4) PCR2015 whereby contracting authorities may, however, deviate from the content of the previous notice and conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information. It is true that reg.76(4) PCR2015 imposes a relatively stringent set of conditions, so that disregard for the (procedural) information disclosed in the previous notice can take place only if all the following conditions are met: (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators; and (b) the contracting authority has, before proceeding to deviate from the published information, (i) given due consideration to the matter, (ii) concluded that there is no breach of the principles of transparency and equal treatment, (iii) documented that conclusion and the reasons for it in accordance with regs.84(7) and (8) PCR2015, and (iv) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in conformity with the information contained in the notice. For these purposes, "participants" means any economic operators which have responded to the notice and have not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned [reg.76(5) PCR2015].

In my view, there are two main difficulties. First, that the provision adopts a very narrow interpretation of the principle of equal treatment that falls into a *participation trap* that will result in de facto discrimination and an unavoidable infringement of the principle of transparency. Second, this is very likely to trigger infringements on the rules applicable to cancellation and retendering of public tenders. As to the *participation trap* or 'trap of tender-specific reasoning', by designing a system that allows contracting authorities to (1) disclose information that preselects a subset of potential suppliers and (2) later on, alter the rules of the procedure in a way that potential suppliers not included in that subset cannot challenge (because they are not informed and, seemingly, there is

no further transparency/publication requirement), reg.76(4) PCR2015 fails to ensure actual compliance with the principle of non-discrimination.[40]

As to the infringement of the requirements for cancellation and retendering of procedures that would otherwise be substantially amended, it seems clear to me that the case law applicable to changes of disclosed contractual conditions applies (if nothing else, by analogy). In that regard, the ECJ has been clear that "*where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender*"[41] are to be deemed substantial modifications of the tender conditions and, consequently, not acceptable. Thus, unless contracting authorities could clearly prove that no other tenderers would have participated had the modified (procedural) conditions been disclosed from the beginning, reliance on reg.76(4) PCR2015 is bound to trigger an infringement of EU law.

For all of the above, I consider reg.76 PCR2015 a very clear instance of defective transposition of the requirements in Art 76 Dir 2014/24. It also seems to me to evidence the defects that can result in taking the copy-out approach too far, as it can actually create additional burdens for contracting authorities that will need to design their own procedure (and bear the ensuing legal risks) rather than being allowed to rely on a set of default procedural rules. Consequently, I think that it should be substituted by a sensible, fully-developed set of procedural rules applicable to the award of contracts for social and other specific services.

3. Selected issues of implementation

This section concentrates on the transposition in the UK of some of the rules of Directive 2014/24/EU that create a significant departure or innovation as compared to the 2004 rules.

3.1. Exclusion

As can be inferred from the general copy-out approach to the transposition of Directive 2014/24/EU, the rules on exclusion of economic operators of Art 57 have been transposed without introducing seemingly significant changes in reg.57 PCR2015[42]—eg by keeping the maximum length of exclusion on the basis of mandatory and discretionary grounds to 5 and 3 years respectively.[43]

However, some aspects of reg.57 PCR2015 trigger some questions of interpretation and application, as well as of compatibility with EU law.[44] The discrepancy I find most striking is that, in all instances where Art 57 of Directive 2014/24/EU refers to 'conviction by final judgment', reg.57

[40] By analogy, see the reasoning of the General Court regarding the need for clarity of tender specifications in its Judgment of 17 February 2011 in *Commission v Cyprus*, C-251/09, EU:C:2011:84 35-51 (not in English).
[41] Judgment of 4 June 2009 in *Commission v Greece*, C-250/07, EU:C:2009:338, para [52]. By analogy, see also Judgment of 19 June 2008 in *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, para [35].
[42] For extended discussion, see Butler (n 22) *in totum*. See also A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 57)*, http://pcr2015.uk/regulations/regulation-57-exclusion-grounds/.
[43] Nonetheless, note that the initial transposition had applied the maximum exclusion period of 5 years to exclusion based on lack of payment of taxes or social security contributions, which was corrected by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016*; Butler (n 22) 194-195 and above (§2).
[44] For very limited guidance, see Procurement Policy Note 01/19: Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing, 22 February 2019, https://www.gov.uk/government/publications/procurement-policy-note-0119-applying-exclusions-in-public-procurement-managing-conflicts-of-interest-and-whistleblowing.

PCR2015 simply refers to 'conviction'[45]—with the only except of exclusion on the basis of breaches of the obligation to pay taxes or social contributions, where reg.57(3)(b) retains the requirement for the breach to be 'established by a judicial or administrative decision having final and binding effect'. The reason for the substitution of 'conviction by final judgment' with mere 'conviction' in most instances is not clear from the *Explanatory Memorandum* and it seems hard to understand why the UK Government would have wanted to create a possibility to 'anticipate' debarment in cases of not final (and thus unsafe) convictions. In any case, in my view, a *consistent interpretation* of reg.57 PCR2015 with Art 57 of Directive 2014/24/EU requires convictions to be by final judgment regardless of the specific wording of the UK transposition. Similarly, it is not clear why reg.57 PCR2015 does not transpose Art 57(6) *in fine* and thus omits the explicit rule that an economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility to self-clean during the period of exclusion resulting from that judgment in the Member States where the judgment is effective. This provision has direct effect. Consequently, contracting authorities must apply it, regardless of the fact that reg.57 PCR2015 does not include such a rule.[46]

The mandatory grounds for exclusion were transposed in reg.57(1) PCR2015 by reference to the domestic criminal law statutes that correlate with the EU instruments listed in Art 57(1) of Directive 2014/24/EU. However, in order to ensure consistency with EU law and avoid the need to reform the PCR2015 if there were changes in those EU instruments, a closing clause was inserted with the purpose of ensuring that contracting authorities are obliged to exclude economic operator that have been convicted of "*any other offence within the meaning of Article 57(1) of the Public Contracts Directive—(i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland; or (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland*". This may create uncertainty as to the specific mandatory exclusion grounds applicable at any given point in time, which CCS tries to reduce by publishing a detailed list of mandatory exclusion grounds.[47] Still regarding mandatory exclusion grounds, it is worth noting that the UK has taken advantage of the possibility to create a public interest exception as foreseen in Art 57(3) of Directive 2014/24/EU. Indeed, reg. 57(6) and (7) gives discretion to contracting authorities, who *may disregard* the concurrence of (i) mandatory exclusion grounds, including lack of payment of taxes or social contributions established by final and binding decision, "*on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment*", or (ii) mandatory exclusion on the basis of lack of payment of taxes or social contributions established by final and binding decision where only minor amounts of taxes or social security contributions are unpaid or there was no time to fulfil its obligations before the expiry of the relevant deadline. It is remarkable that reg.57(6) and (7) do not specify the conditions in Directive 2014/24/EU and, consequently, important concepts such as the specific circumstances that can justify a public interest, or the unpaid amounts that are considered 'minor', remain unclear.[48]

[45] This concerns the transposition of Art 57(1) by reg.57(1), that of Art 57(1) *in fine* by reg.57(2), that of Art 57(7) by reg.57(11) and to the omission of the transposition of Art 57(6) *in fine*.

[46] Sanchez-Graells & Telles (n 42).

[47] The current list of mandatory and discretionary exclusion grounds can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551130/List_of_Mandatory_and_Discretionary_Exclusions.pdf.

[48] See A Sanchez-Graells, "Exclusion, Qualitative Selection and Short-listing", in F Lichère, R Caranta & S Treumer (eds), *Modernising Public Procurement. The New Directive* (Copenhagen, DJØF, 2014) 97, 107.

The discretionary exclusion grounds of Art 57(4) of Directive 2014/24/EU are transposed in reg.57(8) PCR2015 without modification. It is worth noting that the UK has not made any of these grounds mandatory for contracting authorities, who retain full discretion to exclude or not economic operators affected by these grounds. From that perspective, it may seem surprising that the UK decided not to transpose the last paragraph of Art 57(4) of Directive 2014/24/EU, whereby Member States may require or provide for the possibility that the contracting authority does not to exclude an economic operator affected by a bankruptcy-related exclusion ground of Art 57(4)(b) if it is established that the economic operator will be able to perform the contract. However, given that exclusion on the basis of bankruptcy-related grounds is fully discretionary for UK contracting authorities, it seems to me that this possibility is open to them despite the lack of transposition of Art 57(4) *in fine*. Concerning the degree of discretion given to contracting authorities, and consistently with the way in which Art 57(4) is transposed, it is also worth stressing that the UK has not imposed any obligations under Art 57(5) second paragraph (see reg.57(10) PCR2015).

Finally, concerning self-cleaning, reg.57(13) to (17) PCR2015 transpose Art 57(6) of Directive 2014/24/EU word for word, with the only exception of the last paragraph. In that regard, the rules on self-cleaning may create some practical difficulties due to eg the lack of precision of the types of technical, organisation and personnel measures that can be taken for the assessment of sufficiency that contracting authorities need to undertake (see reg.57(15)(c) PCR2015). In order to provide some additional detail, CCS has issued additional guidance where it indicates that the actions agreed on deferred prosecution agreements (DPAs)[49] may be submitted as evidence of self-cleaning and evaluated by the contracting authority.[50] The same guidance clarifies that if "*such evidence is considered by the contracting authority (whose decision will be final) as sufficient, the potential supplier shall be allowed to continue in the procurement process*". However, it is not clear what the guidance means when it indicates that the decision will be final. In my view, such decisions are open to challenge both by the interested economic operator (if they are negative) and, possibly, by other tenderers or bidders (if they are positive). This would be in line with the need to provide for effective remedies,[51] and raises important questions about the *actual* finality of the contracting authority's assessment of the evidence on self-cleaning submitted by economic operators.

3.2. Competitive procedure with negotiation

Reg.29 PCR2015 establishes rules for the conduct of competitive procedures with negotiation and transposes the very similar requirements of Art 29 of Directive 2014/24/EU. It does so however by lengthening and complicating its drafting by including unnecessary repetition of time limit-related rules in paragraphs (6) to (10), which could have been minimised by a cross-reference to reg.28 PCR2015. The rules in reg.29 PCR2015 need to be read in conjunction with CCS Guidance on changes

[49] For details, see Serious Fraud Office, *Guidance on Deferred Prosecution Agreements*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/. See also Butler (n 22) 215-217.

[50] CCS, *Procurement Policy Note: Standard Selection Questionnaire (SQ)*, Action Note No 8/16, 9 September 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558520/PPN_8_16_StandardSQ_Template_v3.pdf.

[51] By analogy, see Judgment of 5 April 2017 in *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268. See also A Sanchez-Graells, "'If it Ain't Broke, Don't Fix It'? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts", in S Torricelli & F Folliot Lalliot (eds), *Oversight and challenges of public contracts* (Bruylant, 2018) 495-534.

to procedures.[52] One of the main changes in the new rules is that a lax interpretation of the grounds that justify the use of this procedure[53] may transform it into the default procedure or, in the case of the UK, consolidate its widespread use. Hence, the specific rules that are set out in reg.29 PCR2015 regarding the conduct of negotiations are bound to have a very significant practical impact.

The general design of the procedure is on the one hand close to the competitive dialogue, and on the other hand a variation of the restricted procedure that allows for two main adjustments: (1) the negotiated procedure does not necessarily have to be two-stage, but it can be multi-stage (reg.29(19) PCR2015); and (2) the object of the procurement does not need to be completely defined from the time the negotiations start, but can evolve provided some minimum requirements are not subject to negotiation (reg.29(14) PCR2015). As for the second point, the contracting authority needs to provide sufficiently precise information at the start so that economic operators can make an informed decision whether to participate. This appears to impose a stricter information requirement than that of a competitive dialogue, but less strict than the restricted procedure.

These possibilities of carrying out a multi-stage procedure where requirements can evolve (provided a minimum remains unchanged) will, in my view, be the two main reasons that can justify resorting to a competitive procedure with negotiation instead of a restricted procedure, given that these are the areas where increased flexibility can provide advantages to the contracting authority. However, the significant flexibility given in the UK for the use rough documents at the first stage and detailed requirements at the second stage of a restricted procedure somehow close this gap as reason (2) is concerned.[54]

The design of the procedure in Reg.29 PCR2015 does not address important practical issues, which also remain unaddressed in CCS' guidance, such as (i) the possibility for tenderers to submit initially non-compliant tenders (eg due to the inclusion of reservations) that are later made compliant during the negotiations; (ii) the possibility for contracting authorities to change minimum requirements that are not substantial, in the sense that they would not change the range of competitors or distort competition between those that takes part in the procedure (similarly to what is allowed under reg.76 PCR2015, see above §2); or (iii) the possibility for the contracting authority to clarify/develop or change award criteria during the procedure (eg if subcriteria on quality turn out to be irrelevant after some round of negotiations). These issues are left to practitioners' discretion and, given the limited litigation of public procurement cases, it may well take a long time until case law emerges that addresses these issues.

3.3. Contract modifications that can lead to a duty to retender

Reg. 72 PCR2015 transposes the rules on modification of contracts during their term newly established by Article 72 of Directive 2014/24/EU. The transposition alters the structure of the provision and groups some limitations [reg.72(2) PCR2015] in a way that eliminates repetition and slightly simplifies it. Reg.72 PCR2015 does not transpose the possibility under Art 72(1)(d)(iii) of

[52] CCS, *Guidance on changes to procedures (Competitive procedure with negotiation, competitive dialogue & innovation partnerships). Overview, Key Points and Frequently Asked Questions*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560264/Guidance_on_Changes_to_Procedures_-_Oct_16.pdf.

[53] These are set out in reg.26 PCR2015 in the same terms of Art 26 of Directive 2014/24/EU; see A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 26)*, http://pcr2015.uk/regulations/regulation-26-choice-of-procedures/.

[54] A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 28)*, http://pcr2015.uk/regulations/regulation-28-restricted-procedure/.

Directive 2014/24/EU for contracting authorities to assume themselves the main contractor's obligations towards its subcontractors, since this was not included in reg.71 PCR2015. In my view, this does not represent any infringement of the transposition obligations. The only point where the original transposition deviated from the EU rules concerned the possibility to modify contracts under reg.72(1)(b) PCR2015 due to technical or economic issues, particularly concerning interchangeability and interoperability requirements, where the UK rule made the two conditions alternative, whereas Art 72(1)(b) of Directive 2014/24/EU makes them cumulative. This was corrected by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016*. As it stands now, the substantive content of reg.72 PCR2015 is, in my view, in line with Art 72 of Directive 2014/24/EU.

Given the copy-out approach to the transposition, the same uncertainties that derive from the wording of Art 72 of Directive 2014/24/EU are carried over to reg.72 PCR2015 and the UK legislator has made no attempt to develop rules that provide more precise criteria for the modification of contracts during their term, although CCS has published guidance on the topic.[55] Some of the more interesting parts of the CCS guidance on contract modification concern issues not directly covered by the Directive. In that regard, it is interesting to stress that CCS considers that the rules in reg.72 PCR2015 may apply to call-offs within framework contracts, and that it is not possible to define terms such as 'materially alter' or 'considerably [extend]'. CCS also considers that bank step-in rights in a PPP/PFI contract meet the review clause condition provided the step-in rights are clear, precise and unequivocal, state the conditions under which they may be used, and do not alter the overall nature of the contract.[56]

3.4. Exercise of optionality

It should not come as a surprise that, given the copy-out technique and the main worry of avoiding gold-plating in the transposition, the UK has decided not to develop optional rules concerning:

(i) standard terms for how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Art 58 of Directive 2014/24/EU [Art 19(2) Dir 2014/24];
(ii) the use of specific electronic tools, such as of building information electronic modelling tools or similar for public works contracts and design contests [Art 22(4) Dir 2014/24];
(iii) the possibility of mandating the use of electronic catalogues for specific types of procurement [Art 36(1) Dir 2014/24];
(iv) mandating the award of contracts in the form of separate lots [Art 46(4) Dir 2014/24];
(v) restricting or excluding the possibility of examining tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria [Art 56(2) Dir 2014/24];
(vi) establishing or maintaining either official lists of approved contractors, suppliers or service providers or providing for a certification by certification bodies complying with European certification standards [Art 64(1) Dir 2014/24]; and
(vii) excluding or restricting the use of price only or cost only as the sole award criterion [Art 67(2) Dir 2014/24].

However, the UK has made use of some of the optionality by deciding to allow discretion to contracting authorities to exercise some of the options left open by Directive 2014/24/EU, such as:

[55] CCS, *Guidance on Amendments to Contracts During their Term*, October 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560262/Guidance_on_Amendments_to_Contracts_-_Oct_16.pdf.
[56] *Ibid* 7.

(i) reserving the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or providing for such contracts to be performed in the context of sheltered employment programmes [reg.20(1) PCR2015];
(ii) specifying the level of security required for the electronic means of communication in the various stages of the specific procurement procedure, and that level shall be proportionate to the risks attached [reg.22(17)(b) PCR2015];
(iii) the possibility for sub-central contracting authorities using restricted procedures to set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates [reg.28(7) PCR2015]; and
(iv) the possibility of limiting the number of lots that may be awarded to one tenderer, where tenders may be submitted for several or all lots [reg.46(4) PCR2015].

Similarly, and following the philosophy of minimal transposition, the UK decided to transpose the rules on the use of the negotiated procedure without prior publication. In that regard, it is only worth noting that reg.32 PCR2015 alters the order of Art 32 of Directive 2014/24/EU significantly, but it does not expand any of the grounds for the use of the procedure. In a very similar fashion, and given the long-standing tradition of centralised procurement in the UK and the increasing importance of CCS' activities since its creation in 2010,[57] reg.37 PCR2015 transposes the rules in Art 37 of Directive 2014/24/EU without significant changes. Similarly, reg.39(3) PCR2015 clearly states that contracting authorities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State, which avoids imposing any restriction on the type of non-domestic CPB to which contracting authorities can resort [*cf* Art 39(2) *in fine* Dir 2014/24].

One area where the exercise of the optionality in the Directive has been used more fully concerns subcontracting, which is developed in reg.71 PCR2015 and transposes Art 71 of Directive 2014/24/EU. Reg.71 PCR2015 brings specific rules on how to deal with subcontracting situations, and it has been complemented with additional guidance issued by CCS.[58] In that regard, and without prejudice to the main contractor's liability vis-a-vis the contracting authority [reg.71(2) PCR2015]; that is, without establishing a direct contractual relationship between the subcontractor(s) and the contracting authority, the latter may ask tenderers to indicate any share of the contract that they may intend to subcontract to third parties and any proposed subcontractors [reg.71(1) PCR2015], and it shall do so where works and/or services are to be provided at a facility under the direct oversight of the contracting authority [reg.71(3) PCR2015]. Any changes in the subcontracting structure for the contract need to be notified to the contracting authority promptly [reg.71(4) PCR2015]. Contracting authorities can extend this obligation to certain contracts not carried out in facilities under the direct oversight of the contracting authority, as well to suppliers involved in works or services contracts, and they can go down the chain beyond the first subcontracting tier [reg.71(7) PCR2015].

By and large the contracting authority is left with the discretion to require information about the sub-contractors (and sub-sub-contractors…) and also to investigate their compliance with the

[57] For more details see CCS' policies https://www.gov.uk/guidance/public-sector-procurement-policy. See also the report by the National Audit Office, *Improving government procurement*, 27 February 2013, https://www.nao.org.uk/wp-content/uploads/2013/03/government-proc-full-report.pdf.

[58] CCS, *Guidance on the New Subcontracting Provisions*, October 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560276/Guidance_on_Subcontracting_-_Oct_16.pdf.

requirements of regs.57, 59, 60 and 61 PCR2015. It may decide not to bother with requesting any information from sub-contractors but if it does check for the mandatory exclusion grounds and they are present, the affected sub-contractor must be excluded from the contract. The exception to this discretion is for works contracts and some services contracts [reg.71(3) PCR2015], but not for supplies [reg.71(6) PCR2015]. In these, the contracting authority must require from the main contractor the identity of the sub-contractors and the registry of sub-contractors needs to be kept up to date by the main contractor [reg.71(4) PCR2015]. However, even in these situations, the contracting authority is not under the obligation of checking for grounds for exclusion. This immediately places the contracting authority in a situation where it can monitor and influence the subcontracting activity related to a given contract.

However, the transposition of Art 71 of Directive 2014/24/EU in reg.71 PCR2015 has not maximised the subcontracting management possibilities foreseen in the EU rule. It does not include some of the options in Art 71 of Directive 2014/24/EU, such as the possibility to create mechanisms of direct payment to subcontractors as per Art 71(3) and (7) of Directive 2014/24/EU. However, there are specific rules in other parts of the PCR2015 requiring that 30-day payment terms are flowed down the public sector supply chain,[59] which may mitigate the effects of such transposition option. The new rules in reg.71 PCR2015 also try to mitigate the burden of controlling the supply chain that contracting authorities may otherwise face. It is interesting to note that Art 71(1) of Directive 2014/24/EU stresses that "[o]*bservance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit*." Consequently, the duty for contracting authorities to monitor and ensure compliance with environmental, social and labour law by subcontractors is limited to the general principle of reg.56(2) PCR2015, which refers to the tender itself and seems to restrict the scope of monitoring obligations in a significant way.[60] This is without prejudice of their discretion to check that subcontractors are not affected by exclusion grounds [reg.71(8) PCR2015] and seems to fall short from the possibilities foreseen in Art 71 of Directive 2014/24/EU—and, particularly, the lack of transposition of rules imposing joint liability between subcontractors and the main contractor for compliance with environmental, social and labour law (which is, however, not excluded and thus subjected to general contract and tort law principles). In relation to the enforcement of exclusion grounds on subcontractors, reg.71(9) PCR2015 determines that the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and may require the economic operator to do so where there are non-compulsory grounds for exclusion.

It is worth stressing that, on occasion, the UK's approach to optionality has resulted in insufficient or defective transposition. Indeed, in some cases, the transposition does not clarify the extent to which some of the options considered in Directive 2014/24/EU has specific content in the UK or not. For example, despite the wording of reg.21 PCR2015, which does not make reference to other legislation imposing disclosure obligations on contracting authorities, there is no doubt that general obligations derived from the *Freedom of Information Act 2000*[61] apply to most of their activities. A similar, if not larger difficulty arises from the transposition of Art 50(2) of Directive 2014/24/EU, concerning the possibility for Member States to provide that contracting authorities

[59] A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 113)*, http://pcr2015.uk/regulations/regulation-113-payment-of-undisputed-invoices-within-30-days-by-contracting-authorities-contracts-and-subcontractors/.

[60] For discussion, see A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 56)*, http://pcr2015.uk/regulations/regulation-56-general-principles-in-awarding-contracts-etc/.

[61] 2000 c. 36.

shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis—in which case contracting authorities shall send the grouped notices within 30 days of the end of each quarter. Reg.50(4) PCR2015 adjusts the requirements for the publication of contract award notices to the working of framework agreements, and determines that contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement. This is meant to simplify the operation of the framework agreement once it is in place. Reg.50(4) excuses contracts awarded via framework agreements from being published. In my opinion, reg.50(4) PCR2015 potentially mistransposes, or at least does not transpose very faithfully, Art 50(2)II of Directive 2014/24/EU.

3.5. Aims given by the Directive to Member States

Once more, given the general approach to the transposition, it should come as no surprise that the PCR2015 take a rather minimalistic approach to the transposition where the EU rules imposed specific aims on Member States that, due to their general or imprecise nature, were harder to operationalise in specific rules.

The most remarkable example is the lack of transposition of Art 18(2) of Directive 2014/24/EU imposing an obligation on Member States to ensure compliance with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X. Exactly the same happens with the obligation in Art 61(1) of Directive 2014/24/EU for Member States to ensure that the information concerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date, which is not transposed in the PCR2015. And the same applies to most of the obligations established by Art 83 of Directive 2014/24/EU, as reg.83 PCR2015 reduces the transposition to Art 83(6) on the obligation to keep copies of concluded contracts above certain thresholds.

In a different approach, some of the general obligations that Directive 2014/24/EU imposes on Member States are simply transposed as a general obligation, which does not seem to create an issue from the perspective of formal compliance with the Directive. This is the case of the obligation to ensure the use of electronic communications of Art 22(1) of Directive 2014/24/EU, which is simply recreated in absolute terms in reg.22(1) PCR2015. Or the simple translation of the obligations related to the duty to take appropriate measures to effectively prevent, identify and remedy conflicts of interest straight to the contracting authorities in reg.24 PCR2015. A similar strategy is used concerning the obligation to ensure that contracting authorities have the possibility to terminate contracts as per Art 73(1) of Directive 2014/24/EU.

4. The implementation and recent case law from the Court of Justice

As a complement to the analysis in the previous sections, this special issue seeks to assess the extent to which the transposition of Directive 2014/24/EU has been influenced by, or proves able to cope with, some challenges derived from recent CJEU case law. In view of the previous analysis, it should not come as a surprise that the UK's minimalistic copy-out approach results in very limited ability to resolve those challenges beyond a general duty of consistent interpretation of the domestic rules (almost identical to those of the Directive) with the CJEU's case law. However, at the same time, the lack of domestic rules that deviate from the text of the Directives has the (apparent) practical advantage of allowing for consistency with such case law. This is clearly the case of the *Dimarso* Judgment, where the CJEU established that there is no prior obligation to disclose the evaluation

method because its setting forms part of the internal organisation of the work of the evaluation committee, which 'must be able to have some leeway in carrying out its task and, thus, it may, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders'.[62] Given that UK law does not require the disclosure of the evaluation method, the *Dimarso* Judgment did not create any practical complications. Similarly, at least as a point of law, it is easy to adjust to the flexibility created by the CJEU in its *MT Hojgaard and Züblin* Judgment, as the rules on exclusion and selection of candidates follow the very basic tenor of the rules in the Directive. And it is also easy to adjust to the strict approach followed in *VAR* concerning the timing of the proof of equivalence a specific mark, origin or production. Equally, it is easy to adjust to the requirement to investigate links between tenderers that derives from *Specializoutas transportas*. In all these cases, all that is required is for the contracting authority to comply with the functional requirements derived from the CJEU case law, as there is no domestic rule that could prevent that. Conversely, however, challenging any contracting authority's non-conforming behaviour will face the difficulty of not having a domestic rule on which candidates and tenderers can immediately rely, which will require an otherwise unnecessary exercise of EU law-compliant interpretation of the domestic rules.

Differently, in other instances, the absence of detailed domestic rules creates some difficulties for the operationalisation of the CJEU case law. That is the case, for example, of the *Finn Frogne* Judgment, where the Court established important principles concerning the modification of contracts *ad minus* and the instances in which the nature of the contract can be affected by the modification. Given that reg.72 PCR2015 does not explicitly address these issues, the uncertainty surrounding the interpretation and application of this provision is exactly the same as that involving Article 72 of Directive 2014/24/EU. Moreover, UK practice seems to follow a limiting reading of the *Finn Frogne* case regarding the irrelevance of procurement litigation to justify a substantial modification to an awarded contract and, in particular, the CJEU's position that 'the fact that a material amendment of the terms of a contract results … from [the] intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract … can [not] provide justification for the decision to carry out that amendment without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit.'[63] Indeed, it can be argued that the recent settlement by the Department for Transport of a procurement challenge linked to its 'no-deal' Brexit preparations is in breach of such functional principle.[64] However, the sparsity of the domestic rules of reg.72 PCR2015 make any challenge to such a settlement strategy extremely difficult to articulate.

5. Conclusion

This article has critically assessed the implementation of Directive 2014/24/EU in the UK by the *Public Contracts Regulations 2015*. It has shown how the strict approach to the copy-out principle guiding the transposition of EU law into UK law resulted in a bare bones transposition mainly focused on avoiding gold-plating, rather than on developing a full-fledged regulatory system. In my view, this approach is defective and overlooks the important contextual design of the 2014 EU Public Procurement Package as a set of regulatory instruments aimed at harmonising pre-existing public procurement regimes, rather than attempting to create a full-operational set of rules. Despite the

[62] C-6/15 Dimarso, para [29].
[63] C-549/14, Finn Frogne.
[64] See eg 'Government pays Eurotunnel £33m over Brexit ferry case', BBC, 1 March 2019, https://www.bbc.com/news/business-47414699.

increasing prescriptiveness of the EU public procurement rules, which is not questioned,[65] I think it is also undoubtable that they do not provide a sufficiently developed system so that contracting authorities can carry out procurement exercises without additional regulatory development. It is also clear that the EU public procurement rules must rely on general public law mechanisms at domestic level that, in the case of the UK, are not necessarily sufficiently developed. Overall, in my opinion, this was a missed opportunity to develop a full regulatory architecture for the control of public expenditure by means of procurement in the UK. The shortcomings derived from this self-restricted approach to the regulation of procurement are likely to remain for a long time after Brexit, given the UK's future independent membership of the WTO GPA and the likelihood of further requirements to remain aligned with EU law if there is to be any meaningful future EU-UK procurement-related trade.

[65] R Caranta, "The changes to the public contract directives and the story they tell about how EU law works" (2015) 52(2) *Common Market Law Review* 391-459; and in relation with the previous generation of EU rules, S Arrowsmith, "The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?" (2006) 35(3) *Public Contract Law Journal* 337-384.